Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term, 1980

No. 79-1032

Refrigerated Food Line, Inc., *et al., Petitioners*

V.

Republic Industries, Inc., *et al., Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. _____

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v.

Republic Industries, Inc., et al., Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Refrigerated Food Line, Inc. and it above-named statutory trustees, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 11, 1979.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri entered in Civil Action No. 74CV313W2 is unreported. The opinion of the Court of Appeals for the Eighth Circuit is reported at 605 F.2d 412 (1979) and the Memorandum Opinion of the District Court is set out in full therein.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on September 11, 1979. Petitioners' Motion for Rehearing was denied on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Following jury trial of this action in district court, the jury found for Petitioner in the sum of $600,000.00. The district court entered judgment for Respondent notwithstanding the verdict and granted Respondent's alternative motion for a new trial. The district court's order was founded upon a single finding: that "[T]here was no evidence that after the defendant leasing company replevied its trailers from plaintiff truck line, that there were not a multitude of trailers which could be leased from other owners...." 605 F.2d 417 (1979).

This finding -- that there was no shortage of trailers -- was briefed and argued in the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed on the basis that: "[W]e are satisfied that there is simply no substantial evidence, direct or circumstantial, that the defendants or any two of them entered into any conspiracy to drive RFL (Petitioners) out of business or to exclude it from the competitive leasing market for refrigerated trailers." 605 F.2d 419 (1979). The Eighth Circuit discussed the conspiracy issue in some detail, but not the "shortage of trailer" finding of the district court.

Petitioners seek review of two questions:

1. WHETHER PETITIONERS' FIFTH AMENDMENT RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD HAS BEEN VIOLATED BY THE COURT OF APPEALS AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT ON A THEORY THAT WAS

NOT CONSIDERED OR PASSED UPON BY THE DISTRICT COURT AND CONSEQUENTLY WAS NOT BRIEFED OR ARGUED BY COUNSEL FOR EITHER SIDE IN THE COURT OF APPEALS.

2. WHETHER SUBSTANTIAL EVIDENCE WAS ADDUCED TO ALLOW A JURY TO FIND THAT THERE WAS A CONSPIRACY, COMBINATION OR AGREEMENT BY RESPONDENTS TO DAMAGE PETITIONERS IN THEIR BUSINESS OF PROPERTY

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth, Seventh and Fourteenth Amendments to the United States Constitution, and Rule 50b of the Federal Rules of Civil Procedure are set forth in pertinent part in the Appendix at pp.16 to 19.

STATEMENT OF THE CASE

The Petitioners joined together in 1969 to form Refrigerated Food Line, Inc., (TR. 51). The company intended and for two years, did haul frozen meats and other meat by-products from the midwest to points in the southeastern portion of the United States (TR. 56). When forming the company, the Petitioners purchased the prerequisite operating authorities for their intended interstate operation from a trucking company operating out of Springfield, Missouri, Billyeu Transport, Inc. These authorities were being operated properly pursuant to a grant from the Interstate Commerce Commission (TR. 111). The total initial investment by the Petitioners was nearly $290,000.00 (TR. 47, 48).

At the time of the formation of Refrigerated Food Line, Inc., (hereinafter RFL), the type and quantity of trucks and refrigerated trailer units necessary to effectively meet their business goals were in short supply (TR. 48, 63, 184). They were, however, able to lease a number of older tractor/trailer units from World Leasing Company, which at that time in 1969 was owned and operated by Earl Lewis (TR. 46), a person who at that time was not connected with any of the Respondents. The rates were less than what RFL would have been required to pay had they been leasing new trucks (TR. 95). These rates were also substantially less than the cost of purchasing refrigerated trailer units. The availability of this arrangement was, in fact, the premise upon which the company was formed (TR. 177). There were other additional factors which entered into the lesser rate charged by World Leasing, Inc. The most notable among them was the fact that RFL promised to lease any tractor/trailer returned to World Leasing, Inc. by other users within a short period of time thereafter (TR. 60). This enabled World Leasing, Inc. to keep its equipment in constant use with a resulting constant flow of revenue in its behalf.

RFL's agreement with World Leasing, Inc., was the same as the agreement World Leasing, Inc., had previously with Billyeu Transport, Inc. (TR.178), the company from which RFL purchased its Interstate Commerce Commission authorities. World Leasing allowed Billyeu to run 60 to 90 days in arrears and offered and then followed the same arrangement with RFL.

In the fall of 1969 and the early winter of 1970, RFL was able to lease additional tractor and trailer units, from Cook Leasing and Rapid Way. (TR. 6). Due to the scarcity of trucks at that time, delivery

was not to be until the lat summer of 1970 (TR. 63). These units were intended to supplement the original fleet operated by RFL and obtained largely from World Leasing, Inc., so as to enable it to move steadily and properly toward the initial goad of obtaining and placing 50 tractor/trailer units in service (TR. 62, 68, 184). This level of operation was, in the opinion of investors, and in fact, that which was necessary to produce the profit which should reasonably be expected from their investment (TR. 68).

In late 1969 or early 1970, World Leasing, Inc., was sold to Republic Industries, a Respondent named herein (TR. 63). Republic Industries is a holding company which also then owned and still operates Riss International Corp. Republic Industries then owned the leasing company and the trucking company that are Respondents in this action (TR. 224, 225). Immediately after World Leasing was purchased by Republic Industries, Riss began making several applications to the Interstate Commerce Commission as a potential competitor of the newly formed RFL. Riss asked for operating authorities from the same points in the Midwest that RFL was serving to the identical locations in the southeast that RFL was serving (TR. 64, 86). If successful, Riss would be carrying meat and would need the same type of refrigerated equipment World Leasing was leasing to RFL. These repeated attempts to obtain operating authorities from the Interstate Commerce Commission failed (TR. 125, 166-67). RFL steadfastly and consistently opposed any and all applications offered by Riss, and the referees of the Interstate Commerce Commission often based their opinions, denying the applications, on the fact that no need was demonstrated by Riss for additional authorities in that the companies who then had the authorities, i.e. RFL and others, were doing

a satisfactory job in handling the load (TR. 166-67).

By early summer of 1970, RFL had opposed and Riss had been denied several temporary operating authorities. It was then that World Leasing, Inc., unilaterally, without notice, raised the lease charges on their tractor/trailer units being leased to RFL, adding a $40.00 per day charge on all tractors and a $25.00 per day charge on all trailer units(TR. 66, 181). The uncontradicted testimony at trial was that these rates were "ridiculouc" (TR. 66). and not at all competitive. They were, in fact, tantamount to a cessation of business. At that point, refrigerated unites were scarce and neither the investors and operators of RFL nor any prudent trucking firm could meet the increase and operate at a profit. World Leasing then reneged on its 90 day payment agreement and replevied its equipment -- one-third of the RFL fleet. The units replevied by World Leasing were placed in operation with Riss International (TR. 127, 230, 316).

With one-third of its fleet gone, and even with the additional units which had been contracted for in late 1969, RFL was unable to keep its gross expenses low enough to allow it to stay in business. The units which had previously been contracted for were intended to supplement those provided by World Leasing, Inc., and thereby move RFL closer to obtaining its goal of 50 units (TR. 62, 68, 184). Although RFL had been operation at a profit for the first six months of calender year 1970 before its equipment was taken in World Leasing's replevin action, it was unable to sustain that profit thereafter, leading RFL to its financial demise (TR. 259).

With RFL unable to agressively oppose Riss International in tis contained requests for temporary operating authorities from the Interstate Commerce Commission, Riss did, in fact, receive the I.C.C. authorities that had previously been served by RFL.

Riss succeeded in large part on the grounds that RFL, then short of equipment, was unable to sustain its operation (TR. 166-67, 223) for additional authorities. Because RFL ceased operation June 30, 1971, and was thereafter disbanded, this action was brought in the names of the trustees for RFL and the case was submitted to the jury upon a Section 1 violation of the Sherman Act, 15 U.S.C. 1, which makes illegal a conspiracy or combination, having as its object or effect, a restraint of interstate trade and commerce, whether accomplished by legal or illegal means.

On May 24, 1978, the jury returned a verdict in favor of the Petitioners, finding that they were damaged in the amount of $600,000.00. On July 24, 1978, Judge William R. Collinson entered his Memorandum Order awarding attorneys fees in the amount of $100,000.00. On August 25, 1978, the Court entered its Judgment Entry awarding the Petitioners the sum of $1,825,123.45; said sum representing the trebled jury verdict plus attorneys fees set off by $74,876.55 from the judgment of the Circuit Court of Greene County, Missouri of May 12, 1972, and the accrued interest thereon.

Subsequently, the Respondents moved for Judgment Notwithstanding the Verdict and in the alternative a New Trial.

In memorandum and order dated December 29, 1978, the Honorable Judge William R. Collinson granted the Repsondents Motion for Judgment Notwithstanding the Verdict and Alternative Motion for New Trial.

The court concluded that "there was no evidence thaat after the Respondent leasing company replevied its trailers from Petitioner truck line that there were (sic) not a multitude of trailers that could be leased from other owners, and, in fact, Petitioners own records demonstrated that it thereafter operated a larger fleet of leased

trailers than the small fleet it had leased from one of the Respondents."

In the alternative, Judge Collinson granted Repsondents motion for a new trial, and stated three reasons in support of that ruling, each dealing with the issue of damages. Each of the three issues is set forth in full as follows:

> "1. It was error to admit into evidence and allow (Petitioners') expert to testify from the financial analysis and projections which the expert stated was not prepared under any approved or recognized accounting methods.
>
> 2. It was error to give the (Petitioners') requested instruction authorizing recovery of anticipated lost profits, because there was no evidence from which such damages could be computed without the most flagrant speculation and conjecture.
>
> 3. The verdict awarding damages in the amount of $600,000.00 was not based on a scintilla of evidence in the case, and was so excessive as to demonstrate bias and prejudice against the (Repsondents) by the jury."

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S FIFTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW HAVE BEEN VIOLATED DUE TO A LACK OF NOTICE AND OPPORTUNITY TO BE HEARD ON AN ISSUE DEEMED DISPOSITIVE BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit agree that Petitioners failed to prove a prima facie violation of Section One of the Sherman Act. The courts do not agree on which element was left unproven, however. While Petitioner's earnestly argue that a submissible case was made, we further contend that in affirming the decision of the district court on a theory never addressed in the district court opinion or argued before the appellate court, the court of appeals has denied Petitioner's due process of law.

Due process requires, at a minimum, that litigants (or appellants) be fairly appraised of the basis of a court's ruling. When access to a higher tribunal is granted, the access must be meaningful in that the litigant should have an opportunity to be heard on relevant questions of law.

In the instant case, the district court entered judgment non obstante verdicto (hereinafter j.n.o.v.) following a substantial jury verdict. The court's brief, stated grounds for granting the motion are set out in full in the court of appeals opinion. 605 F. 2d 412,417 (1979). Stripped of irrelevancies and ignoring for the moment the court's conditional grant of

a new trial, the order states simply that the Petitioners failed to prove damage to their business as a result of their failure to acquire substitute trailers for those replevied by the Respondent. While Petitioners again renew their contentions that this finding is erroneous and that the underlying factual determination should have been left to the jury, it is significant to note that the district court did not grant Respondent's motion for j.n.o.v. due to the failure of the Petitioners to prove a consipracy, combination or agreement. Indeed no other element of a Sherman § 1 violation was even mentioned as being absent for the purposes of granting the motion. Upon reading the court's memorandum opinion, the Petitioners concluded, as any reasonable litigants would, that their proof was deemed insufficient by the trial judge only in that one particular element. Petitioners could reasonably conclude that in order to reverse the decision of the district court, they must brief and argue that single issue before the Eighth Circuit in a successful fashion. That is precisely what Petitioners did - - no other element of an antitrust offense was argued by either party on appeal because no other element was considered lacking by the district court.

The Eighth Circuit took a different approach to the motion, however. Instead of finding that the actions of the Respondents were not damaging to Petitioners, the court of appeals said that the Respondents actions could not be characterized as a consipracy. The court wrote at 419:

> Aside from the question of whether plaintiff was damaged as a result of the

> action of World in filing and prosecuting its replevin suit and advising plaintiff that rates would be raised and that plaintiff would be required to keep its rental payments current, we are satisfied that there is simply no substantial evidence, direct or circumstantial, that the defendants or any two of them entered into any conspiracy to drive RFL out of business or to exclude it from the competitive leasing market for refrigerated trailers.(emphasis added).

Two arguments must be noted here. First, the court of appeals did not affirm the validity of the district court's opinion that Petitioners failed to adduce sufficient evidence of loss to their business as a result of a shortage of trailers. In fact, the only reference made to the issue in the entire opinion, the Eighth Circuit reached the opposite conclusion:

> There is substantial evidence of record to the effect that in the spring and summer of 1970 the supply of refrigerated trailers available for leasing was limited. There can be no question that RFL was injured to some extent in its business by its loss of the eight trailers and three tractors that it had leased from World, and that it also suffered because it could not replace that equipment at the same rates or on the same payment terms that had prevailed as between RFL and World prior to June, 1970.

It is true that the Eighth Circuit concluded that the loss of the trailers did not put Petitioners out of business. But, in the con-

text of a motion for j.n.o.v., such a conclusion is immaterial. Whether or not the plaintiffs in an antitrust suit are "put out of business" by a restraint of trade, they may still be compensated for any damage sustained to their "business or property." It may be that the entire failure of RFL may not be attributed to the replevin, but that is merely a question of damages, not a failure to make a submissible case under Sherman § 1. Because the Eighth Circuit concluded that some damage was sustained it is clear that the position of the district court was not adopted by the court of appeals.

Second, the appellate judgment rested therefore on its finding that Petitioners failed to prove a conspiracy to restrain trade on the part of Respondents. As will be argued infra,this finding is erroneous. What is of more concern is its effect on the fairness of the proceeding.

Simply put, Petitioners were never permitted to present the arguments, legal and persuasive, in support of their position that a conspiracy, combination or agreement was proven sufficiently to permit a jury finding on the issue. The Court of Appeals, without guidance from the district court or the argument from counsel affirmed a decision on a theory that the trial court might never have accepted. The practice is particularly unfair in light of the fact that the trial court,blessed with the opportunity to access the credibility of the witnesses whose motivation as officers of the Respondent corporations was at issue, did not find proof of conspiracy lacking.

Elsewhere in this Petition, Petitioner will pray that the proceedings be remanded to the district court with instructions to enter judgment in accordance with the verdict or, in the alternative to begin a new trial on the issue of damages. However, if this relief may not be granted, Petitioner should be afforded an opportunity to carefully brief and argue its position on the "conspiracy question" before the Eighth Circuit Court of Appeals. It is fundamentally unfair for the opportunity to appeal a judgment to a higher authority to be rendered meaningless by completely unforeseeable judicial action.

II.THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT PETITIONERS FAILED TO ADDUCE SUFFICIENT EVIDENCE TO PERMIT REASONABLE PEOPLE TO CONCLUDE THAT A CONSPIRACY EXISTED BETWEEN AND AMONG THE RESPONDENTS.

The Eighth Circuit properly noted that its standard for review of the evidence in ruling on the propriety of a j.n.o.v. is the same as that of the district court. Like the trial court, courts of appeal are not free to reweigh the evidence and set aside a verdict merely because the judge feels that other results are more reasonable. Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F2d 532 (2d Cir. 1965), cert. denied 382 US.983 (1966). The court must determine if there is any evidence authorizing the jury's verdict. Silvert v. Pennsylvania R. Co, 197 F.2d 371 (7th Cir. 1952). The affirmance of a j.n.o.v. is justified only if the evidence is so overwhelmingly preponderant in favor of the movant as to admit of no other reasonable conclusion. Deer v. Safeway Stores, Inc., 404 F.2d 634 (10th Cir. 1968). In light of this narrow standard of review and the Supreme Court's stated preference for trial by jury, Dimick v. Schiedt,

293 U.S. 474 (1935), the court of appeals erred.

The uncontroverted evidence adduced at trial is this: The three defendant (Respondent) corporations were all part of Republic Industries under the control of Robert Riss and with interlocking directorates. Riss International was attempting to get I.C.C. authority to haul meat from Whchita, Kansas to the Southeast and was being opposed by RFL (Petitioner). Without the use of the additional trailers and without the demise (at least temporary) of RFL, the authorities could not be obtained. The rates at which RFL could lease refrigerated trailers from Respondents were raised to non-competitive levels. Once RFL failed to pay the higher rates, the trailers were replevied and immediately put to use by Riss International.

Even in the absence of direct proof of discussions or agreements between the Respondent companies, it is obvious that a jury could reasonably infer a conspiracy from proof of a business motion for the acts and the chain of events leading to the replevin. The fact of common ownership and unity of business purpose has been held sufficient to infer a combination or agreement. Interstate Circuit, Inc.,v. U.S. 306 U.S. 208 (1939).

It is no answer to say, as the court of appeals did, that the competitive position of Riss was not significantly improved by the addition of eight trailers and three tractors to its fleet. That was only half of the story. The jury could have inferred that the motive for the conspiracy was to reduce RFL's fleet, thus making Riss' application for I.C.C. authorities seem better by comparison.

Six reasonable people, properly instructed as to the law by the court, found that Respondents conspired to damage the plaintiff. Four other reasonable people, only one of whom watched the witnesses testify, disagree. Honest, reasonable disagreements are to be resolved in favor of juries and the appellate court should have so found. The verdict should be reinstated.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition be granted and a writ of certiorari issue.

MAX VON ERDMANNSDORFF
Counsel for Petitioners

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

Refrigerated Food Line, Inc., et al., Petitioners,

v.

Republic Industries, Inc., et al., Respondents.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public daner; nor shal any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter incontroversy exceeds the sum or value of $10,000.00, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000.00, computed without regard to any setoff or counter-claim, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

2. By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ or certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

3. By certification at any time by a court of appeals of any question of law in any civil or ciminal case as to which instructions are desired, and upon such certificaiton the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

RULE 50 (b), FEDERAL RULES OF CIVIL PROCEDURE

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as is the requested verdict had been directed or may order a new trial.

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No. 79-1032

Refrigerated Food Line, Inc., *et al., Petitioners*

V.

Republic Industries, Inc., *et al., Respondents.*

Appendix To
Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A: OPINION AND MEMORANDUM OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

REFRIGERATED FOOD LINE, INC., et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 74CV313-W-2
REPUBLIC INDUSTRIES, INC., et al.,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND GRANTING ALTERNATIVE MOTION FOR A NEW TRIAL

In this antitrust suit the plaintiff corporation contends that its financial failure was due to an unlawful conspiracy between the defendant corporations to restrain trade by excluding plaintiff from competing in the leasing market for refrigerated trailer units. This was the sole issue (a Sherman Act, Section One, violation) upon which plaintiff requested a verdict authorizing instruction.

Without summarizing the evidence, or lack of evidence, this Court finds that the plaintiffs wholly failed to make a case on this issue. There was no evidence that after the defendant leasing company replevied its trailers from plaintiff truck line, that there were not a multitude of trailers which could be leased from other owners, and, in fact, plaintiff's own records demonstrated that it thereafter operated a larger fleet of leased trailers than the small fleet it had leased from one of the defendants.

This Court would not have submitted this case to the jury except for recent admonitions by the Court of Appeals of this Circuit that, to save judicial time, all doubtful cases should be submitted, and the trial court could then rule on submissibility in passing on post-trial motions.

This Court will grant the defendants' motion for judgment notwithstanding the verdict.

The defendants have quite properly also filed an alternative motion for a new trial. The Court will grant the alternative motion for a new trial upon the following grounds:

1. It was error to admit into evidence and allow plaintiffs' expert to testify from the financial analysis and projections which the expert stated was not prepared under any approved or recognized accounting methods.

2. It was error to give the plaintiffs' requested instruction authorizing recovery for anticipated lost profits, because there was no evidence from which such damages could be computed without the most flagrant speculation and conjecture.

3. The verdict awarding damages in the amount of $600,000.00 was not based on a scintilla of evidence in the case, and was so excessive as to demonstrate bias and prejudice against the defendants by the jury.

It is therefore

ORDERED that defendants' motion for judgment notwithstanding the verdict be, and is hereby, granted; and

FURTHER ORDERED that defendants' alternative motion for a new trial be, and is hereby, granted in the event the judgment for the defendants ordered above be set aside.

/s/ Wm. R. Collinson
District Judge

Date:
12/29/78

APPENDIX B: OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1062

Refrigerated Food Line, Inc.,a corporation, Van Gover, Kenneth Johnston, Tom A. Kretsinger, M.G. Rippey, Warren H.Sapp, William H.Tate and Howard Wood, as statutory trustees for Refrigerated Food Line, Inc.,a corporation,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Republic Industries, Inc., Riss International Corporation, and World Leasing, Inc.,	*	
Appellees.	*	

Submitted: May 18, 1979

Filed: September 11, 1979

Before LAY,BRIGHT and HENLEY, Circuit Judges.

HENLEY,Circuit Judge.

This is an appeal by plaintiffs from a final judgment

in a private antitrust suit entered in late December, 1978 by the United States District Court for the Western District of Missouri (The Honorable William R. Collinson, District Judge). The claim of the plaintiffs was based on § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Plaintiffs alleged that the defendants had entered into an unlawful conspiracy in restraint of interstate commerce, which conspiracy was directed at the corporate plaintiff, and that as a result of the alleged conspiracy the business of the corporate plaintiff had been destroyed. Plaintiffs sought treble damages, a reasonable attorney's fee and costs as provided by § 4 of the Clayton Act, 15 US.C. § 15.[1]

The suit was commenced in 1974 shortly after an earlier suit commenced by the corporate plaintiff had been dismissed without prejudice. After much pretrial work-up the case was finally tried to a jury with Judge Collinson presiding on May 2 2 and 23, 1978. The jury found in favor of the plaintiffs and assessed actual damages in the sum of $600,000.00. Judgment was entered for treble that sum, plus an attorney's fee of $100,000.00. The gross amount of the judgment was $1,900,000.00 plus costs. However, one of the defendants, World Leasing, Inc., had filed a

[1]Plaintiffs claimed originally that the defendants had violated not only § 1 of the Sherman Act but also § 2 of that Act, 15 U.S.C. § 2, and § 7 of the Clayton Act, 15 U.S.C. § 18. However, in the course of the proceedings in the district court the § 2 and § 7 claims were abandoned.

counterclaim against the corporate plaintiff based on a judgment that it had obtained in 1972 in the Circuit Court of Greene County (Springfield), Missouri. When the district court's judgment was entered, the amount of the Circuit Court judgment, including interest, amounted to about $75,000.00, and the amount of that judgment was set off against the judgment that was awarded the plaintiffs by the district court.

After that judgment was rendered, the defendants filed a motion for a judgment notwithstanding the verdict (judgment n.o.v.) or, alternatively, for a new trial. On December 29, 1978 the district judge filed an Order amounting to a memorandum opinion granting the basic motion for judgment n. o.v. and conditionally granting the alternative motion for a new trial. Fed. R. Civ. P. 50(b), (c) and (d). A final judgment based on that Order was entered, and the plaintiffs have appealed.

The case involves the interstate hauling of perishable meat and meat products from points in the Midwestern States to points in the Southwestern States. Such operations are, of course, subject to the regulatory jurisdiction of the Interstate Commerce Commission (ICC). During the period with which we are concerned, that runs from early 1969 through June 30, 1971, the governing regulatory statute was Part II of the Interstate Commerce Act, frequently referred to as the Motor Carriers Act. 49 U.S.C. § 301 et seq.[2] At

[2]In 1978 the Interstate Commerce Act was extensively

this point we make general reference to that statute and we particularly refer to those sections of it that deal with certificates of public convenience and necessity without which common carriers of freight in interstate commerce cannot lawfully operate. 49 U.S.C. §§ 306-308, as written prior to the 1978 revision of the Act that has been noted.

In order to obtain a certificate, referred to in the industry and in this case as an "authority," a carrier must show that there is a public need for the service,and that he is able and willing to supply that need in an efficient and acceptable manner. A carrier who has acquired an operating authority may lose it if he ceases to be able to provide the requisite service to consignors and consignees of goods and commodities.

The interstate transportation of goods by motor carrier involves the use of "tractor-trailer rigs"consisting of a self-propelled tractor that pulls a trailer. Where perishable products are involved, the trailers must be refrigerated unless the hauls are to be for very short distances. A carrier holding a certificate from the ICC may operate with his own equipment or he may lease the equipment from others. The lessors may be concerns engaged in the leasing of trucking equipment or independent truckers who own their own rigs.

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revised. Act of October 13, 1978, P.L. 95-473, 92 Stat. 1337 et seq., 49 U.S.C. 10101 et seq., reprinted in (1978) U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., 1337 et seq.

To return to this case, the controversy is between a dissolved Missouri corporation, Refrigerated Food Line (RFL), and its seven statutory trustees in dissolution,[3] as plaintiffs, and three corporations as defendants. From the spring of 1969 until its dissolution on June 30, 1971 RFL was engaged in the interstate hauling of meat in refrigerated trailers into Southeastern States such as Georgia, Alabama and Florida. RFL derived revenue from the initial hauls and also from back hauls of exempt commodities[4] from points of original destination.

RFL owned no equipment itself; instead it leased both tractors and trailers from others, including World Leasing, Inc., one of the defendants in the case.

It is now time to identify the defendants more closely.

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[3]The suit was commenced by the corporation after it had been dissolved, and the defendants moved to dismiss the complaint on the ground that RFL had no capacity to sue. The district court sustained that contention but gave leave for an amendment of the complainti so that the trustees, the officers and directors of the corporation, could appear in the case as plaintiffs. An amended complaint was filed promptly in which pleading RFL was again named as a plaintiff but was joined by the dissolution trustees. Thus, the action was saved. We find it convenient henceforth in this opinion to refer to the plaintiffs collectively as "RFL" or as "plaintiff."

[4]Generally unprocessed fresh fruits and vegetables, such as citrus fruits from Florida.

World Leasing, Inc. (World) is an equipment leasing concern that operates or operated in Tulsa, Oklahoma. In early and mid-1969 and in prior years it was owned by Earl Lewis and was operated by him and by his brother, John Lewis.

The next defendant to be mentioned is Riss International, Inc. (Riss). Riss is engaged in the interstate trucking business, and it hauls both perishable and non-perishable products. The perishable products,including meat, are hauled in refrigerated trailers. Riss, which is located in Kansas City, Missouri, has been in the trucking business since 1927.

The third defendant is Republic Industries, Inc. (Republic). That company was formed in 1969 as a holding company, and the stock in it is owned by Mr. Robert Riss of Merriam, Kansas and other members of the Riss family. That family evidently owned the stock in the defendant Riss for many years prior to the formation of Republic. After Republic was formed, it took over the ownership of Riss. Also in 1969 Republic purchased the defendant World. Thus, Republic since 1969 has owned both of the other defendants in the case.[5]

As has been observed, Earl Lewis was the President of

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[5]According to the testimony of Mr. Riss, Republic not only owns Riss and World but also owns a housing development and a bank.

world prior to the acquisition of that company by Republic and he remained as President after that acquisition and until his discharge and that of his brother John in June, 1970.

RFL was not formed as a separate or independent corporation. Rather, "Refrigerated Food Line" is nothing but a change in the corporate name of another corporation, Bilyeu Transports, Inc. (Bilyeu), which was a trucking company operating out of Springfield, Missouri. The name was changed when the investors involved in this case acquired the stock in Bilyeu.

Bilyeu was owned originally by Bill Bilyeu, who also owned or controlled other corporations. In late 1968 and early 1969 Bilyeu was in serious financial difficulties, being indebted to the Empire Bank of Springfield in the sum of around $290,000.00, and was behind in its payments to the extent of some $40,000.00. Bilyue did have some valuable assets consisting of nineteen operating authorities from the ICC authorizing it to haul meat into the Southwestern States. Another corporation owned by Mr. Bilyue had a limited authority, referred to as "Sub-42," that authorized that company to haul meat from Wichita, Kansas to Springfield and to another point in Missouri. However, that authority stipulated that it could not be "tacked" to other authority permitting the hauling of meat out of Springfield to points in the Southeast.

Bilueu leased equipment from World. That equipment was old, and the rentals charged by World were lower than would have been charged for newer equipment. Additionally, Bilyeu had an understanding with Earl Lewis that Bilyeu would be permitted to become from sixty to ninety days delinquent in paying its rentals to World.

In early 1969 Kenneth Johnston and other individuals who appear in this case as plaintiff trustees were interested in forming a trucking company of their own. All of these individuals had some experience in the trucking business. Mr. Johnston conferred with Earl Lewis about the possibility of forming a company, and apparently Lewis suggested that the Johnston group take over Bilyeu and its operating authorities.

Johnston and his associates conferred with their Kansas City attorneys, Messrs. Kretsinger & Sapp, and an arrangement was worked out whereby the stock and assets of Bilyeu were acquired, and the corporate name was changed to Refrigerated Food Line. Earl Lewis came into the venture and became the largest single investor, holding 35% of the stock. He became the Chairman of RFL's Board of Directors, and Maurice Gene Rippey, who had been working for Bilyeu, also invested in RFL and became the President and operating manager of that company.

It was understood that World would lease equipment to RFL just as it had leased equipment to Bilyeu, and that

the same "credit arrangement" that had existed between World and Bilyeu would continue between World and RFL. Mr.Lewis continued to be the President of World.

As consideration for the take-over of Bilyeu by the Johnston group, the latter assumed the indebtedness of Bilyeu to the Bank. Additionally, the members of the group invested $100,000.00 in cash. Of that sum $40,000.00 was used to bring the obligation to the Bank up to date, and the other $60,000.00 was used to purchase interest bearing certificates of deposit, the proceeds of which could be used as working capital as the RFL operation got under way.

According to the evidence of plaintiff, the "game plan"of RFL was to start out on a small scale with a relatively few units being leased from World and gradually to expand the operation to the point at which it would have fifty tractor-trailer units on the road. It appears that RFL was particularly interested in hauling meat out of Wichita, and in that connection it purchased the "Sub-42" authorization that has been mentioned.

RFL began operations in late March, 1969. Later in that year and without the knowledge of the RFL investors,other than Earl Lewis, World was sold to the Republic holding company. The result of that transaction was, as stated, that Republic became the owner of both the leasing company, World, and the original Riss trucking company. Lewis remained as President of World until he was discharged in the spring

of 1970 when the management of Republic learned that he was also the principal stockholder in RFL and Chairman of the Board of that company, and that he had permitted RFL to become seriously behind in its rental payments to World. We will return to that subject presently.

The record reflects that for many years the defendant Riss had held certificates authorizing it to haul meat from midwest points to the "East Coast" but that prior to about the late 1960's it had not had authority to haul to the "Southeastern States."

In 1969 and possibly prior thereto and on into 1970 Riss at the instance of certain shippers in the Midwest, including shippers out of Wichita, Kansas, began making applications for authority[6] to haul meat into the Southeastern States. Those applications were opposed as a matter of course by other carriers, and RFL was a protestant in connection with some of the applications. [7]

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[6] It appears that the ICC issues three types of operating authority, namely: emergency temporary authority that is extremely short term; temporary authority that is valid for a longer period of time; and permanent authority. Most of the Riss applications were, at least originally, for emergency temporary authority.

[7] The controversies about authorities that were presented to the ICC at various levels were complicated, and no useful purpose would be served by undertaking to describe them in detail. Suffice it to say that they existed, and that RFL was involved in them.

In June, 1970 RFL was in possession of eight refrigerated trailers and three tractors that it had leased from World and owed back rentals and other charges as to that and perhaps other equipment amounting to around $50,000.00. In that month and after the discharge of Lewis as President of World, Gale Strother, an employee of Republic, contacted Rippey, as operating manager of RFL, and demanded that the back rentals be paid or that the equipment in possession of RFL be returned, and Rippey was also advised that in the future rental rates on equipment leased by RFL from World would in any event be raised very substantially.

Mr. Rippey advised Mr. Strother that RFL could not pay the proposed increased rentals. RFL did not comply with World's demand for payment of back rentals; nor did RFL return the equipment that it had in its possession. Consequently, World commenced a replevin suit in the Circuit Court of Greene County. World claimed that it was entitled to repossess its equipment, that it was entitled to past due rentals and other charges, plus interest, and that it was entitled to damages for allegedly wrongful withholding of possession of its property by RFL. By posting bond World was able to obtain possession of the eleven units that have been mentioned by early July, 1970.

RFL defended that suit and filed a counterclaim for damages. The position of RFL seems to have been that the action of World in raising the rates and filing the replevin suit amounted to a breach of a binding contract between

RFL and World, acting through Lewis.

That case was tried in the Circuit Court and was decided in May, 1972. The Circuit Court held that World was entitled to possession of the equipment and that it was also entitled to judgment for back rentals plus accrued interest. The claim of World for damages for wrongful detention and the counterclaim of RFL for damages were both dismissed. World was awarded a monetary judgment of slightly more than $55,000.00. As will be seen, by the time that judgment was rendered RFL was out of business, and no part of the judgment was paid. It was the amount of that judgment, plus continuing interest, that was set off against the judgment that the district court originally awarded to RFL in this case.[8]

There is substantial evidence of record to the effect that in the spring and summer of 1970 the supply of refrigerated trailers available for leasing was limited. There can be no question that RFL was injured to some extent in its business by its loss of the eight trailers and three tractors that it had leased from World, and that it also suffered because it could not replace that equipment at the

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[8] We note at this point that there was no appeal from the judgment of the Circuit Court, and the validity of that judgment is not questioned here. While that judgment is not res judicata with respect to the antitrust claims of the plaintiff, it is res judicata as to all issues that were or could have been presented properly to the state court in the replevin suit.

same rates or on the same payment terms that had prevailed as between RFL and World prior to June, 1970. After the loss of the equipment leased from World, RFL was required to lease additional equipment from others at higher rates and probably without the liberal credit terms extended by Mr. Lewis.

The loss of the World equipment, which constituted about a third of the fleet that RFL had on the roads in the first half of 1970, did not put RFL out of business. In fact, during the remainder of its business life RFL had a larger fleet of equipment than it had at the time of the repossession by World of the equipment that RFL had leased from World.

RFL continued to operate during the second half of 1970 and during the first half of 1971. However, the operation was not financially successful, and RFL was dissolved as of June 30, 1971.

A few months prior to June 30, 1971 RFL filed its antitrust suit against Republic, Riss and World. A substantial pretrial record was accumulated in that case. However, it was dismissed in 1974 after the dissolution of RFL and, as mentioned, was promptly refiled.

Plaintiff's theory under § 1 of the Sherman Act is that the defendants conspired to restrain interstate commerce by excluding RFL from competing in the leasing market for

refrigerated trailers, that the conspiracy was successful, and that as a result of it the business of RFL was destroyed.

The defendants deny that there is any validity to that theory. Defendants take the positon that there was no conspiracy among them in restraint of interstate commerce and that no actions on the part of the defendants, or any of them, were the cause of the business failure of RFL. The position of the defendants is that RFL was under-financed and that it could not operate without access to equipment rented at unreasonably low rentals and with leave to run behind for a substantial period of time with respect to payment of rentals.

As has been said, the case was tried in May, 1978. At the conclusion of plaintiff's case the defendants filed a formal motion for a directed verdict, and they filed a similar motion at the close of all of the evidence. These motions were denied, and the case was argued and submitted.

The trial court gave all of the instructions requested by the plaintiffs; it gave some of the instructions requested by the defendants and denied others. No complaint is made here as to the wording of the particular instructions given.

The trial judge told the jury in essence that before it could find for the plaintiff it must find: (1) that

the defendants had been guilty of conspiracy to restrain interstate trade and commerce in the manner that has been mentioned; and (2) that the conspiracy, if any, had damaged the business or property of the plaintiff (or plaintiffs as they were at that time).[9]

With respect to damages the jury was instructed that if it found for the plaintiff it should award compensatory damages as shown by a preponderance of the evidence; and the jury was told that it might consider lost profits as an element of damage, but that an award of damages could not be based on speculation or conjecture.

Perhaps to the surprise of the trial judge, the jury found in favor of the plaintiff, and the judge initially accepted the verdict and rendered judgment thereon, including an award of an attorney's fee. Later, in granting the motion of the defendants for judgment n.o.v., or, in the alternative, for a new trial, the district judge filed a short opinion which we set out here in full.

> In this antitrust suit the plaintiff corporation contends that its financial failure was due to an unlawful conspiracy between the defendant corporations to restrain trade by excluding plaintiff from competing in the leasing market for

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[9] In order for a plaintiff to recover damages under § 4 of the Clayton Act he must prove not only that there was a violation of the federal antitrust laws, but also that the violation damaged him in his business or property.

refrigerated trailer units. This was the sole issue (a Sherman Act, Section One, violation) upon which plaintiff requested a verdict authorizing instruction.

Without summarizing the evidence, or lack of evidence, this Court finds that the plaintiffs wholly failed to make a case on this issue. There was no evidence that after the defendant leasing company replevied its trailers from plaintiff truck line, that there were not a multitude of trailers which could be leased from other owners, and, in fact, plaintiff's own records demonstrated that it thereafter operated a larger fleet of leased trailers than the small fleet it had leased from one of the defendants.

This Court would not have submitted this case to the jury except for recent admonitions by the Court of Appeals of this Circuit that, to save judicial time, all doubtful cases should be submitted, and the trial court could then rule on submissibility in passing on post-trial motions.

This Court will grant the defendants' motion for judgment notwithstanding the verdict.

The defendants have quite properly also filed an alternative motion for a new trial. The Court will grant the alternative motion for a new trial upon the following grounds:

1. It was error to admit into evidence and allow plaintiffs expert to testify from the financial analysis and projections which the expert

states was not prepared under any approved or recognized accounting methods.

2. It was error to give the plaintiffs' requested instruction authorizing recovery for anticipated lost profits, because there was no evidence from which such damages could be computed without the most flagrant speculation and conjecture.

3. The verdict awarding damages in the amount of $600,000.00 was not based on a scintilla of evidence in the case, and was so excessive as to demonstrate bias and prejudice against the defendants by the jury.

It is therefore

ORDERED that defendants' motion for judgment notwithstanding the verdict be, and is hereby, granted; and

FURTHER ORDERED that defendants' alternative motion for a new trial be, and is hereby, granted in the event the judgment for the defendants ordered above be set aside.

For reversal the plaintiff contends that it made a submissible case as to liability, that the district court did not err originally in admitting the testimony of plaintiff's expert witness, Jerry M. Bland, that the evidence justified an award of damages, and that the jury verdict of $600,000.00 was not excessive and did not manifest any bias or prejudice on the part of the jury.

Naturally, the defendants take issue with the plaintiff on all of those propositions and would have us uphold the judgment n.o.v. in their favor.[10]

The motions of the defendants for a directed verdict and their post-trial motion for judgment n.o.v. were based primarily on the contention that the plaintiff had failed to make a submissible case, that is to say that there was no substantial evidence to support a jury finding of a violation of § 1 of the Sherman Act or of damage proximately resulting from such a violation, if there was one.[11]

In passing upon a motion for judgment n.o.v. on the ground that there was no substantial evidence to sustain the verdict, a district court is required to apply the same standard that it applied to an original motion for a directed verdict, and the court of appeals is required to apply the same standard as that required of the district court. Such a motion must be denied unless the movant's case is so strong as to leave no room for reasonable difference of

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[10]Counsel for the defendants in their brief do not argue in support of the alternative ruling of the trial court that a new trial should be granted should the judgment n.o.v. be reversed by this court. However, we assume that the defendants would still want a new trial should the judgment n.o.v. be reversed.

[11]An alternative contention of the defendants was based on the "Noerr-Pennington" doctrine discussed by this court in detail in Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F. 2d 288 (8th Cir. 1978). We find is unnecessary to discuss that alternative contention.

opinion. The evidence must be viewed in the light most favorable to the party opposing the motion, and that party is entitled to the benefit of all inferences favorable to him that reasonably may be drawn from the evidence. See, e.g., Singer Co. v. E. I. du Pont de Nemours & Co., 579 F.2d 433, 440-41 (8th Cir. 1978); Davis v. Burlington Northern, Inc., 541 F.2d 182, 186 (8th Cir.), cert. denied, 429 U.S. 1002 (1976; Schneider v. Chrysler Motors Corp., 401 F2d 549, 554 (8th Cir. 1968; see also the discussion in 9 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2524.

We have given careful consideration to the record in this case, including the trial transcript. Aside from the question of whether plaintiff was damaged as a result of the action of World in filing and prosecuting its replevin suit and advising plaintiff that rates would be raised and that plaintiff would be required to keep its rental payments current, we are satisfied that there is simply no substantial evidence, direct or circumstantial, that the defendants or any two of them entered into any conspiracy to drive RFL out of business or to exclude it from the competitive leasing market for regrigerated trailers.

We think that the evidence, when viewed in the light most favorable to plaintiff and giving plaintiff the benefit of all favorable inferences, establishes no more than that when the top management of the Riss operation discovered the existing state of affairs, including the fact

that RFL was indebted to World for about $50,000.00, management simply exercised a legitimate right to demand the payment of back rentals or the return of the equipment in plaintiff's possession, to advise plaintiff that in the future its rental rates would be raised, and to commence the replevin suit when plaintiff failed to either pay the back rentals or return the leased equipment. That the business failure of the plaintiff in 1971 was due to any action taken by the defendants in 1970 is in the highest degree speculative. In this connection we do not overlook the fact that after World repossessed its trailers, it refurbished them and then leased them to Riss, at least for a time. We do not think, however, that it can legitimately be inferred from that fact that the filing of the replevin suit was designed to make the eight trailers and three tractors in question available to Riss or that it improved the competitive position of Riss in any significant way.

The final judgment of the district court granting the defendants a judgment notwithstanding the verdict of the jury is affirmed. Hence, there is no occasion for us to consider the action of the district court in conditionally granting the defense motion for a new trial.

Affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C: ORDER OF THE EIGHTH CIRCUIT COURT OF APPEALS DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1062

Refrigerated Food Line, Inc., a corporation, Van Gover, Kenneth Johnston, Tom A. Kretsinger, M.G. Rippey, Warren Sapp, William H. Tate and Howard Wood, as statutory trustees for Refrigerated Food Line, Inc., a corporation,	*	
Appellants,	*	Appeal from the United States District Court for the Western District of Missouri
v.	*	
Republic Industries, Inc., Riss International Corporation, and World Leasing, Inc.,	*	
Appellees.	*	

Petition of Appellants for Rehearing filed in this cause having been considered, it is now and here ordered by this Court that the same be, and it is hereby, denied.

Dated: October 1, 1979.

/s/ J.HENLEY
Circuit Judge

Supreme Court, U. S.
FILED
JAN 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1032

REFRIGERATED FOOD LINE, INC., *et al., Petitioners,*

v.

REPUBLIC INDUSTRIES, INC., *et al., Respondents.*

Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

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RESPONDENTS' OPPOSITION TO PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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RESPONDENTS' OPPOSITION TO PETITION

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Petitioner RFL asserts that the trial judge and the unanimous Court of Appeals were wrong in holding that there was no credible evidence to support an alleged conspiracy to exclude it from competing in the leasing market for refrigerated trailer units. In order to make a Supreme Court question out of this failure to convince any judge that there was an evidentiary basis for the alleged conspiracy, RFL asserts that its Fifth Amendment rights were violated. Its first question assumes that this conspiracy theory was not "con-

sidered or passed upon by the District Court" and "not briefed or argued" in the appellate court (Petition, at 2-3).

The trial court disposed of the conspiracy issue in granting judgment n.o.v. as follows:

> "In this antitrust suit the plaintiff corporation contends that its financial failure was due to an unlawful conspiracy between the defendant corporations to restrain trade by excluding plaintiff from competing in the leasing market for refrigerated trailer units. This was the sole issue (a Sherman Act, Section One, violation) upon which plaintiff requested a verdict authorizing instruction.
>
> "Without summarizing the evidence, or lack of evidence, this Court finds that the plaintiffs wholly failed to make a case on this issue." *Refrigerated Food Line, Inc.* v. *Republic Industries, Inc.*, 605 F.2d 412, 417 (8th Cir. 1979).[1]

As the Court of Appeals pointed out in its footnote 10 at Page 418, the Defendants did not even argue in support of the District Court's alternative new trial ruling. The argument on the appeal was thus confined to the no conspiracy ruling which was the sole basis for the n.o.v. judgment.

Since the Petition seeks Supreme Court review on a patently false premise, it may be denied without consideration of the argument following Petitioners' erroneous Statement of the Questions Presented.

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[1] The Petitioners' failure to attach the Opinion it wants reviewed to its Petition, whether inadvertent or not, is all that prevents exposure of Petitioners' misrepresentation of what the courts below did, on the face of the Petition.

ARGUMENT

In any event, there is no reason to review the Eighth Circuit's decision in this case. The Petitioners' statement of alleged facts makes no effort to deal with the careful and thorough recital of facts appearing in the appellate opinion. Those facts are supported by evidence. The Petitioners' record citations do not support its own factual claims or refute anything said in the opinions below.

Instead of trying to show on appeal that the no conspiracy holding of the trial judge was wrong, RFL tried to show that his subsidiary statement as to the general availability of trailers was mistaken. It tried to do this by pointing to evidence that trailers were in short supply when Earl Lewis and the minority shareholders bought the Bilyeu business and renamed it RFL. Lewis' favorable terms for RFL on the World Leasing trailers he then owned gave RFL a competitive advantage in the refrigerated trailer leasing market. Refrigerated trailers were not available from anyone else on comparable terms, then or at any other time.

When Earl Lewis sold World to Republic, those trailers became a Republic asset. Mr. Riss retained Mr. Lewis as President of World on the mistaken assumption that Lewis would further World's interest by collecting any overdue rentals on its trailers. Instead, he allowed RFL's debt to continue in default to benefit his 35% interest in RFL. Earl Lewis and the other RFL shareholders knew that continuance of this accommodation of RFL by Lewis must end whenever Mr. Riss discovered Lewis' adverse interest in RFL. Lewis was fired as President of World by

Robert Riss when Riss discovered this conflict of interest. RFL then had to compete for trailers in the leasing market and could not lease them on terms that would keep it afloat.

We respectfully submit that the Petition should be denied.

Respectfully submitted,

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